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AN ANALYSIS OF DOING BUSINESS*

By Elcanon Isaacs

The problems of a foreign corporation doing business arise for the greater part as the result of a general policy adopted by the various states by which they attempt to exclude all outsiders from engaging in commercial activities in their boundaries. This policy remains as a tradition from the time when this country was composed of separate sovereignties and is one of the characteristics of an independent state which neither the Articles of Confederation nor the Constitution was able to eradicate. The Constitution limits the use of tariffs and duties which are still utilized by one foreign country against another. It also prevents the use of force, the method which was employed in the Middle Ages and which compelled the king who derived revenue from the commerce of foreign merchants to take them under his personal protection. The Constitution also restricts the use of legislation and requires justification under the police or taxing power for efforts at exclusion. Nevertheless, a great variety of limitations has been developed so that while theoretically a person in one state can enter another without let or hindrance to do business, he finds that notwithstanding the protection afforded he may be required to conform to many local restrictions.

The hostility which the states have directed against all outsiders[1] has been especially pronounced against foreign corporations.[2] A description of the attitude toward the latter, if not the reason therefor, may be found in Paul v. Virginia, where the court said:[3]

"... There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restrictions, it is easy to see that with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state would, in fact, be controlled by corporations created by other states."

As a result of this distrust, the corporation of one state finds itself confronted by numerous disabilities when it enters another to do business. For instance, it may be required to comply with the local police and tax laws which are also imposed on individuals and domestic corporations.[4] It no doubt may be required

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(1) Ward v. Maryland (U. S. 1870) 12 Wall. 418; cf. New York State v. Roberts (1898) 171 U. S. 658, 19 Sup. Ct. 58, and cases cited in dissenting opinion.

(2) Bk. of Augusta v. Earle (U. S. 1839) 13 Pet. 519, 591.

(3) (U. S. 1869) 8 Wall. 168, 181-2.

(4) Browning v. City of Waycross (1914) 233 U. S. 16, 34 Sup. Ct. 578.

to conform to restrictions which are placed only on parties who enter the state.[5] It must often, in addition, submit to numerous burdens for which foreign corporations are especially singled out. These may be, among others, requirements that agents be appointed for service of process,[6] discriminatory taxes,[7] registration as a prerequisite of doing business,[8] or preference of local creditors in the distribution of local creditors in the distribution of assets.[9]

The reason why requirements of this nature may be imposed is that a foreign corporation is a creature of local law and is not recognized except through comity. It can have no legal existence beyond the sovereignty where it is created,[10] and unless it is engaged in interstate commerce, or is employed by the federal government,[11] has no right to enter a state except by the consent of the latter.[12] Such state, therefore, can exclude it entirely or admit it on prescribed terms and conditions,[13] or exclude it without cause after it has been admitted,[14] subject to certain constitutional limitations which may become applicable as a result of its presence.[15]

While, therefore, discriminatory legislation against individuals is for the greater part rendered innocuous by the Federal Constitution,[16] such legislation when directed against a corporation in the same position as an individual or partnership,[17] is generally effective.[18] Although corporations have been held to be citizens within the provision of the Constitution which extends the judicial power of the courts of the United States to controversies between citizens of different states,[19] they are not such within the clause of Article IV, § 2 of the Constitution which provides that citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.[20] Nor is a corporation a citizen within the clause of the Fourteenth Amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.[21]

While it is also true that a corporation has been held to be a person within the Fourteenth Amendment,[22] prohibiting any state from depriving any person of property without due process of law,[23] and from denying to any person within

(5) McCready v. Virginia (1877) 94 U. S. 391.

(6) St. Clair v. Cox (1882) 106 U. S. 350, 1 Sup. Ct. 354.

(7) Ducat v. Chicago (1870) 10 Wall. 410; Phila. Fire Ass'n v. New York (1886) 119 U. S. 110, 7 Sup. Ct. 108.

(8) Diamond Glue Co. v. United States Glue Co. (1903) 187 U. S. 611, 23 Sup. Ct. 206.

(9) Blake v. McClung (1898) 172 U. S. 239, 19 Sup. Ct. 165.

(10) Bk. of Augusta v. Earle, supra, footnote 2.

(11) Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania (1898) 125 U. S. 181, 8 Sup. Ct. 737.

(12) Hooper v. California (1894) 155 U. S. 648, 15 Sup. Ct. 207.

(13) Paul v. Virginia, supra, footnote 3.

(14) Phila. Fire Ass'n v. New York, supra, footnote 7.

(15) Blake v. McClung, supra, footnote 9; Southern Ry. v. Greene (1909) 216 U. S. 400, 30 Sup. Ct. 287.

(16) Ward v. Maryland, supra, footnote 1.

(17) Crutcher v. Kentucky (1890) 141 U. S. 47, 57, 11 Sup. Ct. 851.

(18) Blake v. McClung, supra, footnote 9.

(19) St. Louis & San Francisco Ry. v. James (1896) 161 U. S. 545, 16 Sup. Ct. 621.

(20) Paul v. Virginia, supra, footnote 3.

(21) Orient Ins. Co. v. Daggs (1869) 172 U. S. 557, 19 Sup. Ct. 281.

(22) Smyth v. Ames (1898) 169 U. S. 466, 522, 18 Sup. Ct. 418.

(23) Blake v. McClung, supra, footnote 9.

its jurisdiction equal protection of the laws,[24] a corporation desiring to enter a state to do business therein cannot invoke these guarantees. The due process clause does not apply until a corporation has acquired property in the state and the right to enter is not property.[25] The equal protection of the laws cannot be invoked until the corporation is already in the jurisdiction.[26]

It is only when a foreign corporation is engaged in interstate commerce that its business is protected from state regulation.[27] When the federal government took commerce[28] under its exclusive protection,[29] many commercial activities were thereby removed from the interference of the states.[30] As far as these are concerned, there is no discrimination between the corporation and the individual:[31]

"To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

A certain part of the business of foreign corporations may, therefore, be protected from state regulation by virtue of the commerce clause of the Constitution.

The immunity from state control derived from the fact of interstate commerce, which is usually made the point of inquiry in decisions on the subject, has been referred to here, however, solely for the purpose of removing it from the scope of this discussion. To examine the question whether a foreign corporation enjoys federal protection is to assume that its acts amount to doing business, and while it is true that an affirmative answer to the question indicates that such is the case, a negative answer indicates nothing. The reason for this is that doing business is a more comprehensive term than commerce. In Paul v. Virginia,[32] a corporation soliciting insurance through an agent was carrying on business,[33] but its activities were not commerce. In International Textbook Co. v. Pigg,[34] it was held necessary to find first that the corporation was transacting business before it could be considered whether the Constitution could be invoked. In other words, there can be no commerce to be protected as interstate until business has first been carried on. This principle may be expressed in another way. Until the existence of the fundamental factor is established, namely, the doing of business, it is impossible to predicate anything concerning it, for instance, that it is commerce between the states.[35]

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(24) Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, supra, footnote 11; Southern Ry. v. Greene, supra, footnote 15.

(25) Nat. Council U. A. M. v. State Council (1906) 203 U. S. 151, 27 Sup. Ct. 46.

(26) Blake v. McClung, supra, footnote 9.

(27) Another exception is a corporation in the employ of the federal government. Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, supra, footnote 11.

(28) Gibbons v. Ogden (U. S. 1834) 9 Wheat 1.

(29) Cooley v. Board of Wardens of Port of Phila. (U. S. 1851) 12 How. 299, 319.

(30) Pensacola Teleg. Co. v. W. U. Teleg. Co. (1877) 96 U. S. 1.

(31) Crutcher v. Kentucky, supra, footnote 17, p. 57.

(32) Supra, footnote 3.

(33) Cf. Pennsylvania Lumbermen's Mutual Life Ins. Co. v. Meyer (1905) 197 U. S. 407, 415, 25 Sup. Ct. 483; Crutcher v. Kentucky, supra, footnote 17, p. 59.

(34) (1910) 217 U. S. 91, 30 Sup. Ct. 481.

(35) The question of interstate commerce does not arise in a consideration of what is doing business for service of process. International Harvester v. Kentucky (1914) 234 U. S. 579, 587, 34 Sup. Ct. 944. But see Davis v. Farmers Co-operative Equity Co. (1923) 262 U. S. 312, 43 Sup. Ct. 556.

The foregoing analysis was followed largely in International Textbook Co. v. Pigg,[36] where the proper methodological procedure in determining the final effect of state regulation on the business activities of a foreign corporation was pointed out. It involves (1) determination of whether or not the activities of the foreign corporation amount to doing business within the state. If they are, (2) determination of whether or not such activities are commerce. This step is necessary because the activities may not be such,[37] or the commerce which once protected the corporation may have terminated.[38] If, however, commerce is involved, (3) determination of whether or not it is interstate. Finally, if it is, (4) determination of whether or not the statute or regulation burdens it.

The court in International Textbook Co. v. Pigg,[39] said:

"In view of the agreed facts and the principles announced both by the Kansas Supreme Court and by this court we hold that, within the meaning of § 1283 of the Kansas statute, the International Textbook Company was doing business in the latter state at the time the contract in question was made, and was therefore within the terms of that section.

"But this view as to the meaning of the Kansas statute does not necessarily lead to an affirmance of the judgment below if, as the plaintiff contends, the business in which it is regularly engaged is interstate in its nature, and if the statute, by its necessary operation, materially or directly burdens that business."

Some courts, however, if not most of them, instead of considering that there can be no interstate commerce until some business has been done, have treated the two concepts as being mutually exclusive. According to this view, if the activity is doing business, it cannot be interstate commerce; if it is interstate commerce, it cannot be doing business. To point out all the inadequacies that this line of reasoning leads to is unnecessary, although it is the cause of much of the confusion that is rapidly developing on the subject. It is apparent, however, that (a) to approach the subject by first inquiring whether the activities involved are interstate commerce, and then to decide *ipso facto* that no business has been done, is more illogical than (b) to decide that business has been done and that therefore no interstate commerce is involved.

(a) In Milan Milling Co. v. Gorten[40] a foreign corporation which manufactured and installed milling machinery without having complied with the statute of Tennessee requiring such a corporation to register, was allowed to recover the price therefor, not because the corporation was doing business which involved interstate commerce, but because the business done involved interstate commerce and therefore, the court holds, no business was done.

"In the case at bar, the Maish & Gorten Manufacturing Company, a foreign corporation, had simply contracted with citizens of Tennessee to furnish certain milling machinery, and to adjust it in position in the mill. This company was in no sense engaged in carrying on its business in this state, but was engaged in an act of interstate commerce."

Likewise in Parsons-Willis Lumber Co. v. Stuart,[41] there is a wholly gratuitous discussion of the question whether the preparation and sale of lumber in Ala-

(36) Supra, footnote 34.

(37) Paul v. Virginia, supra, footnote 3.

(38) Browning v. City of Waycross, supra, footnote 4.

(39) Supra, footnote 34, pp. 105-6.

(40) (1894) 93 Tenn. 590, 597, 27 S. W. 971.

(41) (C. C. A. 5th Cir. 1910) 182 Fed. 779.

bama, to be delivered in Kentucky by a Kentucky corporation, is interstate commerce because the court finally decides that such activities do not involve doing business under the Alabama statute requiring registration. An application of the law relating to interstate commerce would have been necessary in this case only if, as in International Textbook Co. v. Pigg,[42] the court had first found that the corporation was transacting business. Having pointed out, however, that the transactions in question were protected by the Constitution, which is true, the court then shows that they do not amount to doing business, which is not so apparent.

(b) In International Textbook Co. v. Pigg,[43] the state court fell into error because it held that the foreign corporation was doing business, but decided, for that reason, that it was not engaged in interstate commerce. The court concludes its opinion:

" . . . It is true that the books and instruction papers were prepared and forwarded to the owner of the scholarship from another state, but the securing of the order therefor and a part payment in advance were done through an agent in this state. This agent was doing business in Kansas, not his own business, as principal, but the company's business, as its agent. *Hence the company was doing business in Kansas.*" (Italics ours.)

The most peculiar of the four possible conclusions which follow from the theory of exclusive meanings was adopted in Hovey v. De Long Hook & Eye Co.[44] The court in a well-considered opinion holds that a Pennsylvania corporation which merely rented an office for the accommodation of traveling salesmen in New York was not transacting business within a statute imposing a penalty on foreign corporations for failure to keep a list of stockholders in the state. The court says, however:

"Neither do I think we should be forward in giving to this statute an interpretation which might precipitate embarrassing constitutional questions. The defendant has the right without interference by the state to conduct interstate business which would doubtless include selling its goods in this state."

It is submitted that if the corporation in question is not doing business, it could not be engaged in interstate commerce by reason of business which is not done.

The reasoning outlined here has also led to a line of decisions which hold that since federal control over interstate commerce is superior to state regulation thereof, doing business, "in contemplation of the statute," necessarily excludes interstate commerce.[45] A distinction between "doing business" and "doing business in contemplation of a statute," if followed out logically may be valid. This reasoning requires as a first proposition, that the corporation be found to be doing business; second, that the business done be interstate commerce; and third, that since the statute is to be construed in connection with the Federal Constitution,[46] the corporation will not be doing business in contemplation of the statute. In applying the first distinction, however, courts which make it, fall into the fallacy pointed out above. In Larkin v. Commonwealth,[47] a foreign

(42) Supra, footnote 34.

(43) (1907) 76 Kan. 328, 332, 91 Pac. 74, rev'd., (1910) 217 U. S. 91, 30 Sup. Ct. 481.

(44) (1914) 211 N. Y. 420, 429, 105 N. E. 667.

(45) Three States Buggy & Implement Co. v. Commonwealth (1907) 32 Ky. L. 385; Bauch v. Weber Flour Mills Co. (1920) 210 Mo. 666, 238 S. W. 581.

(46) Butler Bros. Shoe Co. v. United States Rubber Co. (C. C. A. 8th Cir. 1907) 156 Fed. 1, certiorari denied (1908) 212 U. S. 577, 29 Sup. Ct. 686.

(47) (1916) 172 Ky. 106, 189 S. W. 3.

corporation sold goods in Kentucky by mail and sent around traveling showrooms solely for advertising purposes. The court, relying on Three States Buggy & Implement Co. v. Commonwealth,[48] where the distinction is made, cited cases on interstate commerce, discussed the definition of doing business, and said (p. 112):

"Guided by this definition, and the authorities to which we have referred, we find no difficulty in concluding that the competent testimony in this case shows only interstate commerce transactions, and that the appellant was not 'carrying on business' in this state, and *therefore* not amenable under the statute." (Italics our.)

Having eliminated the factor of interstate commerce from our discussion so that we can now examine the subject without this extraneous and hitherto disturbing element, we must distinguish a number of degrees of doing business, of which three principal ones have already been differentiated in the application of three legal purposes.[49] The least degree is that which will permit service of process in a suit against a foreign corporation. For this the business done must be of such a character as to warrant the inference that the corporation is present in the jurisdiction where service is attempted.[50] A higher degree is necessary to subject such a corporation to a tax on its activity, namely, continued efforts in the pursuit of profit and gain, and such activities as are essential to these purposes.[51] A still higher degree is the standard for the application of statutes requiring qualification in the state, as where the activities of the corporation indicate a purpose to regularly transact business.[52]

The first and third of these were distinguished in Beach v. Kerr Turbine Co.[53]

"It does not follow that statutes fixing the conditions under which a foreign corporation may engage in business in a state are to have the same construction as statutes permitting a foreign corporation to be served in a state where it may be found. In the former it is, of course, a more or less continuing course of business which is meant to be regulated, whereas in the latter the object sought is only to give notice to a corporation of a pending action."

Likewise in Tauza v. Susquehanna Coal Co.,[54] the court said:

" . . . But activities insufficient to make out the transaction of business, within the meaning of those (licensing) statutes, may yet be sufficient to bring the corporation within the state so as to render it amenable to process.

" . . . The nature and extent of business contemplated by licensing statutes is one thing. The nature and extent of business to satisfy the rules of private international law may be quite another thing."

Taxation and qualification were distinguished in Anderson v. Morris & E. R. Co.[55]

"But a much broader meaning is said to be given to the words 'doing business' when used in a tax statute than is given to them when used in a statute which

(48) Supra, footnote 45.

(49) Henry M. Day & Co. v. Schiff, Lang & Co. (S. D. N. Y. 1921) 278 Fed. 533.

(50) Bk. of America v. Whitney Bk. (1923) 261 U. S. 171, 43 Sup. Ct. 311. See infra.

(51) Cf. Von Baumbach v. Sargent Land Co. (1916) 242 U. S. 503, 37 Sup. Ct. 201; People ex rel. Manila El R. R. & L. Co. v. Knapp (1920) 229 N. Y. 502, 128 N. E. 892.

(52) International Textbook Co. v. Pigg, supra, footnote 34.

(53) (N. D. Ohio 1917) 243 Fed. 706, 708; Knutson v. Campbell River Mills (W. D. Wash. 1924) 300 Fed. 241; Atkinson v. United States Operating Co. (1919) 129 Minn. 232, 152 N. W. 410.

(54) (1917) 220 N. Y. 259, 267, 268, 115 N. E. 915.

(55) (C. C. A. 2d Cir. 1914) 216 Fed. 83, 88. In 14a Corp. Jur. 1270 there is a distinction between doing business under three legal purposes, namely, service of process, taxation, and qualification. See also 14a Corp. Jur. 1372.

forbids a foreign corporation to do business in a state until it has complied with the conditions which the statute imposes."

Unfortunately, however, except for a few cases such as the preceding, the distinction pointed out here has not been explicitly recognized, or, if implicitly recognized, has not been observed. In Auto Trading Co. v. Williams,[56] a case where the question of doing business was inquired into to ascertain whether a service of process was valid, the court bases its understanding of the subject on five cases involving some phase of qualifying in the state, and one case construing a tax law. It then cites Case v. Smith, Lineaweaver & Co.,[57] Harrell v. Peters Cartridge Co.,[58] and Berger v. Pennsylvania R. R.,[59] the only decisions dealing with the real question under discussion, namely, service of process.

In Honeyman v. Colo. Fuel & Iron Co.,[60] where an attempt was made to obtain service on a foreign corporation by serving a director, the court held that the corporation was not engaged in business in the state under the authority of People v. Equitable Trust Co.,[61] People v. Horn Silver Mining Co.,[62] and People v. Feitner,[63] all three of which interpreted the meaning of doing business under tax laws.

Some courts, however, take the position, which at least has its simplicity to recommend it, that doing business is a homogeneous operation and one test therefor can be applied for all purposes. In Van Schuyver & Co. v. Breedman,[64] qualification under the Alaskan statutes by a foreign corporation suing on a contract was in question and the court definitely based its decision on International Harvester v. Kentucky,[65] a case where sufficiency of service of process on an agent of the company was involved.

"It is true that this case arose over a question as to amenability of the Harvester Company to process served upon it or one of its agents in the state of Kentucky, but on the question as to whether or not it was 'doing business' within the state of Kentucky the case seems to me controlling. It may be said the Harvester Company was 'doing business' within the state of Kentucky in the sense only that it was thereby rendered amenable to service of process out of the courts of Kentucky, but it was not 'doing business' within the meaning of the corporation laws requiring foreign corporations to file its articles of incorporation, reports, appointment of agents, etc., before it was authorized to do business, or to bring suit upon its contracts in such state. But if it was 'doing business' for one purpose it was 'doing business' for all purposes that were lawful and within the meaning of all laws that were valid and constitutional."

In this case the criterion of doing business taken was that of the least degree. But why, it may be asked, should the least degree be taken for all legal purposes? Why should a foreign corporation be required to register, or submit to the imposition of discriminatory taxes, simply because its activities may be sufficient to warrant service of process on one of its agents? In Bogert &

(56) (Okla. 1919) 177 Pac. 583.

(57) (C. C. N. Y. 1907) 152 Fed. 730.

(58) (1913) 36 Okla. 684, 129 Pac. 872.

(59) (1906) 27 R. I. 583, 65 Atl. 261.

(60) (C. C. N. Y. 1904) 133 Fed. 96.

(61) (1884) 96 N. Y. 387.

(62) (1892) 105 N. Y. 76, 11 N. E. 155, aff'd., 143 U. S. 305, 12 Sup. Ct. 403.

(63) (1902) 77 App. Div. 189, 77 N. Y. Supp. 1017.

(64) (1915) 5 Alaska Rep. 260, 263.

(65) Supra, footnote 35.

Hopper v. Wilder Mfg. Co.,[66] service was held good on the representative of a corporation in charge of an exhibit in a hotel room at a toy manufacturers' fair, who sent orders to the home office. In Nat. Furniture Co. v. William Spiegelman & Co.,[67] service was held good on a buyer of a foreign corporation who placed orders particularly while attending an exhibition of furniture manufacturers. Nor on the other hand is it reasonable to expect that only the highest degree of doing business should be taken as the amount required for all purposes. A corporation should not escape service of process simply because it is not doing enough business to be required to register, or to appoint an agent for service of process.[68]

Turning now to the nature of activities which bring a corporation in the state for the various legal purposes, we find that we are in an uncharted sea as far as principles are concerned. The Supreme Court of the United States has refused to lay down a rule as to what will subject a foreign corporation to service of process:[69]

". . . This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction."

One recent note on the subject concludes:[70]

"For those who expected a well-defined test wherewith to decide each of these problems, this investigation is probably a disappointment. Yet even the courts have admitted that each case must be decided on its individual merits. They are moved only by general principles of policy and have thus far evolved no convenient yardstick for the practitioner. There must, however, be some value in the knowledge that an examination of the cases discloses no such criteria."

Even assuming that it would be possible to harmonize decisions whose logical bases are fallacious and to induce principles therefrom, we would not secure principles of greater accuracy than that of their source. The theories of many of the decisions, as pointed out, are erroneous, the various degrees of doing business are rarely distinguished, the activities of corporations are not standardized, and the cases themselves are in conflict.[71] For these very reasons, however, the need for guiding principles is all the more imperative. An attempt will, therefore, be made to point out tendencies, if not principles.[72]

We can simplify our inquiry by first eliminating a number of activities which have been generally excepted from the definition of the term. These may be divided into two groups, namely, isolated or single transactions and incidental activities for which the corporation is not organized.

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(66) (1921) 197 App. Div. 773, 189 N. Y. Supp. 444.

(67) (1921) 198 App. Div. 672, 190 N. Y. Supp. 831; cf. Rosenberg Co. v. Curtis Brown Co. (1923) 260 U. S. 516, 43 Sup. Ct. 170.

(68) Tauza v. Susquehanna Coal Co., supra, footnote 54. The test of different degrees for legal purposes is not new in the law. In the case of fixtures, the rule against removal is applied with a certain strictness as between landlord and tenant, with more strictness as between tenant for life and reversioner, and with highest strictness as between executor and heir.

(69) St. Louis S. W. Ry. v. Alexander (1913) 227 U. S. 218, 227, 33 Sup. Ct. 245; People's Tobacco Co. v. Amer. Tobacco Co. (1918) 246 U. S. 79, 38 Sup. Ct. 233.

(70) (1921) 21 Columbia Law Rev. 362, 366.

(71) Cf. People ex rel. Manila El. R. R. & L. Co. v. Knapp, supra, footnote 51, with case of Copper Range Co. (Cheney Bros. Co. v. Massachusetts) (1918) 246 U. S. 147, 155, 38 Sup. Ct. 294 and Case of Champion Copper Co. (1920) 246 U. S. 127, 155, 38 Sup. Ct. 295.

(72) Mention should be made of a series of pamphlets published by The Corporation Trust Company of New York reporting and compiling cases on doing business although no differentiation is made between cases involving and not involving interstate commerce nor those construing different legal purposes, except, perhaps, taxation.

(1) Single or isolated transactions have been excluded for possibly all legal purposes.[73] In Cooper Mfg. Co. v. Ferguson,[74] an Ohio corporation made a contract in Colorado with citizens of that state to manufacture and deliver to them in Ohio, a steam engine and other machinery. To the corporation's suit for the contract price the defendants pleaded that when the contract was made the corporation had not registered, did not have a known place of business in Colorado, and did not have an authorized agent on whom process might be served, all of which was required by the laws of Colorado. The court said:

"Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute. . . . The making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of business in Colorado. . . . To require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business or have a place of business in the state, would be unreasonable and incongruous."

Where, however, the corporation is created to perform a single act the rule does not apply,[75] nor where the single act indicates a purpose to continue business in the state.[76]

(2) Incidental activities are acts which a corporation has power to perform but which do not represent the performance of its main purpose.[77] In Conference Free Baptists v. Berkey,[78] a case involving a phase of qualifications, the court referred to this difference.

" . . . A distinction is to be drawn between the purposes of a corporation and its powers. . . . The *purposes* of the plaintiff, as defined in the articles of incorporation, are 'religious, missionary, educational and charitable.' As incidental to these purposes it is granted a variety of *powers*, i. e., the power to prosecute and defend suits at law, the power to use a common seal, the power to take and hold for the objects of said corporation any real or personal property, and the power to sell and convey any estate which the interests of the corporation may require to be sold and conveyed. All of these powers are to be exercised in subordination to the main purposes as first declared. The purchase and sale of property by such a corporation is not one of the ends for which it is organized, but is merely a means to enable it to accomplish those ends."

As stated in this case, a corporation may engage in litigation without being licensed, because a corporation is not organized for the purpose of engaging in litigation.[79] It may collect debts[80] and accept security for debts[81] without qualifying because a corporation is not organized therefor. In like manner,

(73) Hunau v. Northern Region Supply Corp. (S. D. N. Y. 1920) 262 Fed. 181 (service of process.) Anderson v. Morris & E. R. R. Co., supra, footnote 55, (taxation.) Under the particular wording of certain statutes a single transaction has been held to be doing business. Chattanooga Nat. Building & Loan Ass'n. v. Denson (1903) 189 U. S. 408, 23 Sup. Ct. 630 (qualification.) Loomis v. People's Construction Co. (C. C. A. 6th Cir. 1914) 211 Fed. 453, construing Wisconsin statute on qualification.

(74) (1884) 113 U. S. 727, 734, 735, 5 Sup. Ct. 739 (qualification.)

(75) Weiser Land Co. v. Bohrer (1915) 78 Ore. 202, 152 Pac. 869 (qualification).

(76) Deere Plow Co. v. Wyland (1904) 29 Kan. 255, 76 Pac. 863 (qualification).

(77) Green v. Chicago, B. & Q. Ry. (1907) 205 U. S. 530, 27 Sup. Ct. 595 (service of process); People v. Chicago, I. & L. Ry. (1906) 223 Ill. 581, 79 N. E. 144 (qualification.)

(78) (1909) 156 Cal. 466, 470-1, 105 Pac. 411.

(79) Alpena Cement Co. v. Jenkins & Reynolds Co. (1910) 244 Ill. 354, 91 N. E. 480.

(80) Bruner v. Kansas Moline Plow Co. (C. C. A. 8th Cir. 1909) 168 Fed. 218.

(81) Ichenhauser Co. v. Landrum's Assignee (1913) 153 Ky. 316, 155 S. W. 738. Contra: Chattanooga Nat. Building & Loan Ass'n v. Denson, supra, footnote 73.

preliminary negotiations leading to the making of a contract[82] and temporary and incidental acts, such as may be performed by one corporation in the promotion of other corporations,[83] do not require registration in the state.

Other activities performed by corporations for which they are not organized are the holding and disposing of stock. Ownership of stock does not constitute doing business for service of process.[84] It does not constitute doing business for the purpose of taxation,[85] nor for qualification,[86] unless possibly where all or the controlling interest is held.[87]

In like manner, disposing of stock is held not to be doing business so as to warrant service,[88] nor to require a foreign corporation to qualify. In First Nat. Bk. v. Leeper,[89] the court said:

"The business of the corporation here involved was that of a telegraph and telephone company. That is a well-known business, and the prosecution of such business does not consist in selling some of its stock to an individual. Such transaction or such transactions, it is true, may occur, but they are not the usual, or customary, or ordinary business of a telegraph or telephone company, nor is such corporation organized for the transaction of such business."

Another group of corporate activities must be considered before we can take up what is ordinarily meant by doing business, namely, maintenance of an office and the holding of corporate meetings. It would seem that no corporation is organized for the purpose of maintaining an office or holding corporate meetings any more than it is organized for the purpose of engaging in litigation, and yet different rules have been applied to these activities. The failure to distinguish the legal purposes for which doing business is construed has been one of the causes of this.

For service of process, maintenance of an office where the clerical work of a corporation was handled was doing business.[90] For taxation, activities of a foreign corporation which maintained offices at which meetings were held, dividends voted and similar operations carried out, constituted local business.[91] For the somewhat higher legal purpose involved in a statute requiring foreign corporations to keep a list of stockholders in the state, maintenance of an office headquarters for traveling salesmen was held not to be transacting business.[92]

Coming now to qualification, particularly registration, we find several decisions in New York where the question has assumed importance because of the large

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(82) State v. American Book Co. (1904) 69 Kan. 1, 76 Pac. 411; Hogan v. City of St. Louis (1903) 176 Mo. 149 75 S. W. 604.

(83) Bellefield Co. v. Carlton Investing Co. (C. C. A. 3d Cir. 1916) 228 Fed. 621.

(84) Peterson v. Chicago, Rock Island & Pac. Ry. (1906) 205 U. S. 364, 27 Sup. Ct. 513; People's Tobacco Co. v. Amer. Tobacco Co., supra, footnote 69.

(85) Commonwealth v. Standard Oil Co. (1882) 101 Pa. 119; Proctor & Gamble Co. v. Newton (S. D. N. Y. 1923) 289 Fed. 1013.

(86) Toledo Traction, Light & Power Co. v. Smith (N. D. Ohio 1913) 205 Fed. 643.

(87) Colonial Trust Co. v. Montello Brick Co. (C. C. A. 3d Cir. 1909) 172 Fed. 310.

(88) Sunrise Lumber Co. v. Biery Lumber Co. (1921) 195 Div. 170, 185 N. Y. Supp. 711. Contra, Atkinson v. United States Operating Co. (1915) 129 Minn. 232, 152 N. W. 410.

(89) (1906) 121 Mo. App. 688, 693-4, 97 S. W. 636.

(90) St. Louis S. W. Ry. v. Alexander, supra, footnote 69; Tauza v. Susquehanna Coal Co., supra, footnote 54; Washington-Virginia Ry. v. Real Estate Trust Co. (1915) 238 U. S. 185, 35 Sup. Ct. 818. But see Stegall v. American Pigment & Chemical Co. (1910) 150 Mo. App. 251, 130 S. W. 144.

(91) People ex rel. Chicago Junction Rys. v. Roberts (1897) 154 N. Y. 1, 47 N. E. 974; Horn Silver Mining Co. v. New York (1892) 143 U. S. 305, 12 Sup. Ct. 403. But see People ex rel. A. J. Tower Co. v. Wells (1905) 182 N. Y. 553, 75 N. E. 1132, aff'g. (1904) 98 App. Div. 82, 90 N. Y. Supp. 313; People ex rel. Manila El. R. R. & L. Co. v. Knapp, supra, footnote 51.

(92) Hovey v. DeLong Hook & Eye Co., supra, footnote 44.

number of foreign corporations which maintain offices in the state. In System Co. v. Advertisers' Cyclopedia Co.,[93] a Michigan corporation which maintained an office in New York under a lease, employed stenographers and solicitors for advertising, but which transacted all other matters from the home office from which salaries were paid and to which orders were referred for acceptance, was allowed to recover on a contract and was not required to secure a certificate of authority from the Secretary of State to do business. These matters, the court said, were merely incidental to the business conducted in another state. It should be noted, however, that the court based its decision on Penn Collieries Co. v. McKeever,[94] which involved a single transaction, and on People ex rel. Smith Co. v. Roberts,[95] and People ex rel. Kellogg Newspaper Co. v. Roberts,[96] which held that maintenance of an office did not make a foreign corporation liable for taxation. A single transaction has, of course, long been held not to be doing business and, in addition, Penn Collieries Co. v. McKeever itself, although dealing with registration, was decided largely on the basis of a case on taxation.

In Kline Bros. & Co. v. German Union Fire Ins. Co.,[97] where an office in New York was used by the president of the corporation but no business was done or property located in the state, it was likewise held that registration was not required. This is a clearer case in that only the factor of an office existed.

On the other hand, a demurrer was sustained to the complaint of a foreign corporation which did not contain an allegation that the corporation had registered, but which set up a contract under which payments were to be made to the plaintiff at its office in New York. Apparently in this case, East Coast Oil Co. v. Hollins,[98] the mere existence of an office involved doing business. To the same effect is American Case & Register Co. v. Griswold,[99] where it was held that solicitation of business and maintenance of an office in New York required registration.

The examination of this limited question shows the necessity of distinguishing the various degrees of doing business and the unsatisfactory nature of decisions involving one legal purpose but based on cases involving another.

Having cleared the way for an examination of business activities, we can consider them under the classification pointed out above. While it is still essential to consider individual cases, no attempt will be made here to displace the digests. The purpose of this study is to analyze tendencies which are still developing.

(To be concluded)

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(93) (1910) 121 N. Y. Supp. 611.

(94) (1905) 183 N. Y. 98, 75 N. E. 935.

(95) (1898) 27 App. Div. 455, 50 N. Y. Supp. 355.

(96) (1898) 30 App. Div. 150, 51 N. Y. Supp. 866.

(97) (1911) 147 App. Div. 790, 132 N. Y. Supp. 181, aff'd. (1913) 210 N. Y. 534, 103 N. E. 1125; Cummer Lumber Co. v. Associated Manufacturers' Mut. Fire Ins. Corp. (1901) 67 App. Div. 151, 73 N. Y. Supp. 668.

(98) (1918) 183 App. Div. 67, 170 N. Y. Supp. 576.

(99) (1911) 143 App. Div. 807, 128 N. Y. Supp. 206, aff'd. (1912) 206 N. Y. 723, 100 N. E. 1124; Angidile Computing Scale Co. v. Gladstone (1914) 164 App. Div. 370, 149 N. Y. Supp. 807; Woodridge Heights Const Co. v. Gippert (1914) 92 Misc. 204, 155 N. Y. Supp. 363; Vaughn Machine Co. v. Lighthouse (1901) 64 App. Div. 138, 71 N. Y. Supp. 799.

DIGEST OF IMPORTANT DECISIONS

The name of the state is printed in bold face type to enable you to select cases from any particular state. The cases from the National Reporter System are copyrighted by the West Publishing Co., St. Paul, Minn., from whom a copy of any such decision may be obtained for 25 cents.

AGRICULTURE

Indiana board of agriculture renting space in buildings on state fairground for housing of race horses, held a governmental agency not liable for loss of race horse or personal injuries of owner through fire in such buildings, resulting from alleged negligence of board in permitting occupants to use oil-heating stove. Busby v. Indiana Board of Agriculture, 154 N. E. 883, **Ind.**

APPEAL AND ERROR

Party on appeal cannot complain as to propriety or relevance of issues submitted at trial, if he failed to tender other issues to trial court. Greene v. Bechtel, 136 S. E. 294, **N. C.**

Circuit Court of Appeals having jurisdiction, where appeal was taken within proper time, bond deposited, and case duly docketed, citation to bring in additional parties appellees may issue, if necessary, even after expiration of time for taking an appeal. Hart v. Wiltsee, 16 **F.** (2d) 838.

BAILMENT

One receiving delivery of property for purpose of repair is not agent of owner and has no authority to incur obligation which might become lien on property to be repaired. Ross v. Spaniol, 251 Pac. 900, **Ore.**

CORPORATIONS

President and manager of corporation, in the absence of any express authority by vote of directors, held clothed with ostensible authority to give check to corporation in which it owned shares for purpose of enabling the latter to pay regular preferred stock dividends. H. H. Brown Shoe Co. v. H. C. Brown Co., 155 N. E. 22, **Mass.**

CRIMINAL LAW

In prosecution for grand larceny, recitals of Governor or President in papers of extradition that defendant was fugitive held inadmissible; decisions of such officers being confined to executive acts, and proof being required anew in case questions upon which they have passed become relevant upon trial of indictment, defendant then being entitled to confrontation of witnesses against him. People v. Stilwell, 155 N. E 98, **N. Y.**

Defendant is entitled to benefit of any defense shown by entire evidence, even if facts on which defense is based are inconsistent with his testimony. People v. Scalisi, 154 N. E. 715, **Ill.**

Limiting argument counsel for defendants, in murder prosecution, to one hour held reversible error, where some 25 witnesses had testified during the trial. State v. Cash, 136 S. E. 222, **S. C.**

INSURANCE

Where insured, by reason of disability from insanity, was rendered incapable of furnishing proof, thereof, it must be presumed that insured is entitled to benefit of total disability clause waiving premiums during period of disability. Levan v. Metropolitan Life Ins. Co., 136 S. E. 304, **S. C.**

Fire policy "on merchandise contained in or attached to two-story brick building and its additions adjoining and communicating," certain address is intended to refer merely to location of merchandise at date of issuance of policies, and covers merchandise wherever situated in insured's plant in course of its progressive movement therein during process of manufacture. Siskin v. Alliance Ins. Co., 251 Pac. 922, **Cal.**

MASTER AND SERVANT

Statute prohibiting certain employment of infants, reaches to officers and agents of corporation and members of firm as well as the employer, so that superintendent and agent employing infant at forbidden work is liable for his injuries. Toscani v. Litsky, 135 Atl. 667, **N. J.**

Where a brakeman was injured when he went between cars to make a coupling, because the couplers with which the cars were equipped failed to couple by impact, as required by Safety Appliance Act, the violation of the Act was at least one of the efficient causes of the injury, within Employers' Liability Act, and the question of proximate cause does not arise. Philadelphia & R. Ry. Co. v. Auchenbach, 16 **F.** (2d) 550.

WITNESSES

Jury may draw inferences from evasive answers by a party. Cardoza v. Isherwood, 154 N. E. 859, **Mass.**

When a defendant in a criminal prosecution becomes a witness in his own behalf and on cross-examination, in response to any inquiry by the county attorney, admits that he has previously been convicted of a felony, it is error for the court to permit the county attorney, over objections, to inquire as to the character of the offense or to permit the record of the conviction to be introduced. Vanderpool v. State, 211 N. W. 605, **Neb.**

Plaintiff's introduction in evidence of proofs of death executed by insured's attending physician on forms provided by insurer as required by policy, did not waive privilege, so as to entitle insurer to introduce testimony of other physicians as to what they discovered when treating insured, notwithstanding policy provision that proofs shall be evidence in behalf of, but not against, insurer. Acee v. Metropolitan Life Ins. Co., 219 **N. Y.** Supp. 152.